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Attorney for Respondent.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1929

No. 425

PANAMA MAIL STEAMSHIP COMPANY
(a corporation),
Petitioner,

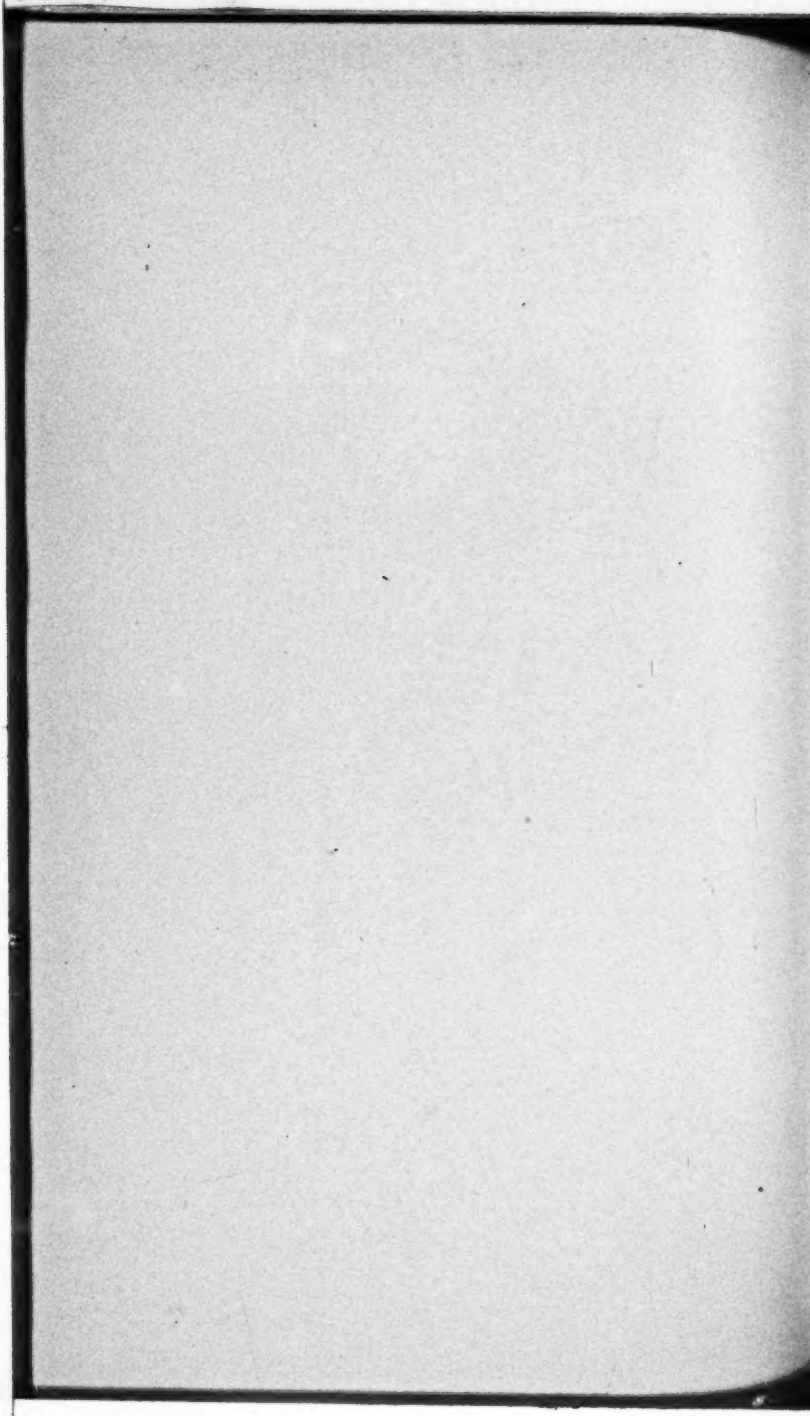
vs.

ERNESTINA ISABELLE VARGAS,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals
For the Ninth Circuit.

H. W. HUTTON,
Pacific Building, San Francisco,
Attorney for Respondent.



Subject Index

Pages

This court will not examine a case where two lower courts have agreed on a question of fact except for manifest error. (Authorities) 5, 6

The learned Circuit Court of Appeals read the record herein, tried the case anew, and the presumption is that both the trial court and the appellate court decided correctly 2

The evidence as to respondent and the assault.....11, 20

Under the admissions of the petition there is no longer any conflict of testimony herein and respondent's testimony stands uncontradicted 6

Blanco, the assaulting party, admitted he assaulted respondent before his deposition was taken.....6, 7, 8

A common carrier is liable for assaults by its employees.. 9, 10

Evidence on the absence of outcries.....15, 16

Outcries and failure to make complaints are not a part of the offense of even criminal rape; they go to the question of credibility only 20

Respondent was corroborated by the laws of nature..... 26

The evidence herein was of two classes, direct and for impeachment 33

Petitioner's authorities 35

Respondent resisted to the extent of her ability and to exhaustion 30, 31, 32

Criminal rape is a statutory offense; civil rape is always treated as an aggravated assault and only want of consent is necessary 28

Miss Villavicencio was not in the stateroom..... 33

Table of Authorities Cited.

	Pages
Baccio v. The People, 41 N. Y. 265	24
Bixby v. Deeman, 54 Fed. 718	6
Estate of McNamara, 181 Cal. 82, 90	26
Garvik v. The Burlington Cedar Rapids Ry., 131 Iowa, 415, 418	26, 33
Jensen v. Lawrence, 94 Wash. 148	21, 28
Kansas City, Southern Ry. Co. v. Willsie, 224 Fed. 908	9
Keamer v. Weigand, 91 Neb. 50	23
Lindville v. Green, 125 Mo. App. 290	23
Mills v. United States, 164 U. S. 644	35
Monongahela R. C. S. C. Co. (6th Cir.), 196 Fed. 375, 379	6
Norton v. Larney, 166 U. S. 511, 518	6
Palmer v. Baum, 123 Ill. App. 584	29
People v. Benson, 6 Cal. 221, 223	36
People v. Bonzani, 24 Cal. App. 549	28
People v. Dohring, 59 N. Y. 374, 383	30
People v. Horn, 25 Cal. App. 583	25
People v. Jones, 76 Cal. App. 144, 148	22
People v. Kuches, 120 Cal. 566, 569	22
People v. Martinez, 59 Cal. App. 121	25
People v. Mazzurco, 49 Cal. App. 275, 276	23
People v. Moore, 155 Cal. 237, 240	36
People v. Norrington, 55 Cal. App. 103, 109	24, 36
People v. Slaughter, 33 Cal. App. 365, 381	22
Smith v. Hendrix, 149 Iowa, 255	23
State v. Miller, 191 Mo. 612	23
State v. Cohen, 99 Minn. 123	23
State v. Peters, 8 Jones, North Car. 19-22	24
Steamboat Co. v. Brockett, 121 U. S. 637, 645	9
Stewart v. Brooklyn & Crosstown R. R. Co., 90 N. Y. 588	9
The City of New York, 54 Fed. 181	2
The Conqueror, 168 U. S. 104, 123	5
The J. G. Gilchrist (2nd Cir.), 183 Fed. 379	6
The Richmond, 103 U. S. 540	5
Totten v. Totten, 172 Mich. 565, 575	28

Text Books

	Page
Am. & Eng. Ency. L. Vol. 33, p. 1428	29
Am. Law. Rep. Ann., Vol. 6, 1911	28
Colliers' New Ency. Ed. 1928, Vol. IV, p. 305	26
Cooley's Blackstone, Vol. 2, p. 1374	22
Cyc., Vol. 33, p. 1521	29
Criminal Code, Sec. 280	10
Judicial Code, Sec. 269	5
Rule 40, Rules U. S. District Court for the Northern District of California	4
Wharton & Stille's Medical Jurisprudence, Vo. III, p. 27.	27

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To the United States Circuit Court of Appeals For the Ninth Circuit.

To the Honorable William Howard Taft, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The respondent respectfully submits the following brief in opposition to the granting of a writ of certiorari herein, and as grounds of opposition states.

I.

THE LEARNED CIRCUIT COURT OF APPEALS READ THE RECORD HEREIN, TRIED THE CASE ANEW, AND THE PRESUMPTION IS THAT BOTH THE TRIAL COURT AND THE APPELLATE COURT DECIDED CORRECTLY.

The sole reason assigned for granting the petition herein is, that counsel for petitioner wishes this court to decide that the learned Circuit Court of Appeals did not perform its duty.

The opinion of that court (R. 297-299) shows that the record must have been carefully read, and the claim urged by counsel for petitioner, that an Appellate Court is not bound by the findings of a trial court on the credibility of witnesses testifying before the trial court when the testimony is conflicting, is in conflict with the case of *The City of New York*, 54 Fed. 181, cited by petitioner itself in its petition. (Pages 20-21.) The Circuit Court of Appeals for the Second Circuit saying (Pet. 21):

> *"The demeanor of the witness is a material and important part of the evidence, which cannot be sent up with the record; and, because this is so, the rule prevails in appeals in admiralty that the opinion of the trial judge will not be disturbed upon questions of fact, depending upon the credibility of witnesses who were examined in his presence, unless there is a decided preponderance of evidence the other way.*
>
> Under the present circumstances, we must decide all questions of fact depending upon the credibility of witnesses as best we may upon reading the record."

That is exactly what the Circuit Court of Appeals did herein, it read the record and decided the law as to civil rape, decided that—

> "the overwhelming weight of the testimony clearly established the fact"

of sexual intercourse (R. 298) and found,

> "First, that the chief witness for the appellant was guilty of false swearing, and, second, that the girl who occupied the stateroom with the appellee during the greater part of the voyage was not present when the outrage was committed;" also that "the defense itself was weak."

We do not know what more the learned Circuit Court of Appeals could have done.

The trial court in its decree said (R. 282):

> "that for and by reason of the matters set forth in the pleadings and shown by the proofs herein, that libelant have and recover, etc."

That is in effect a finding that everything in the pleadings and proofs that will support the decree were true, and the court could not have said any more in any opinion it might have written.

The libel alleged rape and nothing else (R. 7), the testimony shows rape and nothing else, and we cannot understand the following on pages 12 and 13 of the petition herein:

> "There is not the slightest suggestion in the record as to whether the District Court gave this woman $10,000.00 because it thought it was a case of rape, or seduction. * * *"

Petitioner makes no attack on the form of the decree, the order was dated December 15, 1928, and reads (R. 281, 282):

> "It is ordered that libelant have judgment for ten thousand (10,000) dollars, with costs of suit.

Let plaintiff's counsel prepare decree accordingly."

Rule 40 of the Rules of the United States District Court, for the Northern District of California, in Admiralty, which has the force and effect of law, reads:

> "Within five days after the making of an order for the entry of an interlocutory or a final decree the proctor for the prevailing party shall prepare the decree and serve the same upon the proctors for all the other parties or *res* and shall file the original in Court. The other proctors shall thereupon have five days within which to serve and file proposed modifications of the decree so filed. If no modifications are filed within said five days, the decree on file, if approved by the Judge of the Court, shall be by him signed and filed. If any proposed modifications of the decree are filed within the specified time, the Judge of the Court, before signing the decree, shall order such modifications to be made in the decree as he may deem proper. * * *"

The printed record does not show service of the proposed decree on the proctors for petitioner, so we have to rely on the presumption "that the law has been obeyed." The fact is, it was served on December 17, 1928, and petitioner made no objections to it, so it acquiesced in its form. It is dated December 24.

It was within petitioner's power up to that date and up to December 29, the date of its notice of appeal, to suggest findings, if it wished them; but it failed to.

Petitioner knowing all the time and now that there is not a suggestion of anything but rape in the pleadings or evidence taken in court, except the erroneous

conclusions of Commissioner Krull, that have nothing to do with this case, is not harmed.

Section 269 of the *Judicial Code* reads in so far as applicable herein:

> "* * * On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

Seduction does not enter into the case at all, and never did, as its sole witness on the assault, its second steward, testified that he had "never either talked or had any relations of any kind" with respondent. Seduction requires some conversations and some relation with the complaining party; it cannot exist without either or both, so counsel should at least be clear on the basis of the decree, the libel being for rape, the testimony overwhelmingly showing it, and its own witness showing conclusively that there could not have been any seduction.

Miss Vargas the respondent was on the witness stand all of the day of September 12, 1928 (R. 21-22), and resumed the stand on September 13th. The court took part in the examination itself (R. 87, 89-91), and signed a decree for damages for $10,000.00 for rape as there is nothing but rape in the case.

The learned Circuit Court of Appeals followed the following decisions herein:

The Richmond, 103 U. S. 540;

The Conqueror, 168 U. S. 104, 123;

The J. G. Gilchrist (2nd Cir.), 183 Fed. 379;
Monongahela R. C. S. C. Co. (6th Cir.), 196 Fed. 375, 379;
Bixby v. Deeman, 54 Fed. 718;
Norton v. Larney, 266 U. S. 511-518.

II.

UNDER THE ADMISSIONS OF THE PETITION THERE IS NO LONGER ANY CONFLICT OF TESTIMONY HEREIN, AND RESPONDENT'S TESTIMONY STANDS UNCONTRADICTED.

But two witnesses, necessarily, testified to the actual assault, the respondent and Blanco the second steward and assaulting party.

The Appellate Court finds Blanco guilty of false swearing, and the petition herein (p. 31) states:

> "We do not deny that this steward is guilty of false swearing."
>
> "He is a Filipino and from the testimony in this case we think that he lied to us."
>
> (Page 32.) "We will freely admit that this witness did not tell the truth to us or to anyone else."

These admissions establish the correctness of the judgment herein.

The record shows that on March 15, 1928, Blanco was examined on a criminal charge of rape; one witness only, Miss Vargas, testifying through three interpreters who could not understand Spanish (R. 92, 205); petitioner was represented there (R. 203) and it was arranged that respondent should go down to petitioner's office and some financial arrangement should be made. (R. 196, 197-201, 202, 203, 204.)

The next day, respondent with her brother and Mr. Amaral went down to petitioner's office at No. 2 Pine Street (R. 125, 136, 137), and were there told that Mr. Shenick petitioner's port steward was handling the case (R. 137) and they were told to go to Pier 46, which they did, and met Mr. Shenick. Blanco was brought up from the vessel, and was told by Mr. Shenick that he could not stay in petitioner's employ unless he took good care of respondent and the child that was coming that was his. Blanco said he was willing to do that and it was agreed that when the vessel came back May 18th some of Blanco's wages were to be applied to petitioner's relief, Blanco saying:

"Yes, I am sorry for what happened, and I will take care of her." (R. 127.)

(R. 117.) "Blanco said before that he was awful sorry for what he did to my sister."

The writer coming into the case that day, advised them to go to petitioner's office (R. 129) as Commissioner Krull had advised him. (R. 204.) He proceeded no farther, but started this case as he considered it compounding a felony if consummated.

Blanco further wanted to furnish the money for a criminal operation (R. 147) et seq.

He also made statements to another lady, Mrs. Julian, practically to the same effect a few days before his deposition was taken. (R. 160, 161.) (R. 220.)

May 31, 1928, he appeared in counsel for petitioner's office and his deposition was taken, and he testified (R. 211):

"Q. Well, after they came aboard, just tell us when you talked to Ernestina during the voyage up to San Francisco?

A. I never talked to Ernestina at all; just pass there in the saloon and salute me; just say 'Good-morning.'

Q. At any time during the month of October, 1927, did you go into the room, stateroom 31, while Ernestina was in there?

A. No, I never seen her in the room.

Q. Did you at any time have any relations of any kind with Ernestina?

A. No, sir."

Counsel states, as we have heretofore pointed out:

"He is a Filipino and from the testimony in this case we think that he lied to us."

But do not state which time, whether it was in petitioner's office March 16, 1928, or in its counsel's office, May 31, 1928. The Court of Appeals found it to be the latter time so respondent stands uncontradicted herein and corroborated by the admissions of the party who made the assault, made in its business office March 16, 1928.

We do not understand the strictures on Filipinos as a race on page 31 of the petition herein, but think the inquiry that if they are as bad as pointed out, why does petitioner employ them is pertinent, and make the statement that it seems inexplicable why petitioner continued Blanco in their employ after knowing the character he was. He was in its employ in the same position September 13, 1928, while the case was on trial. (R. 195.) It must be presumed that respectable women travel on their vessel "Ecuador."

Admitting that Blanco was untruthful, as the Circuit Court of Appeals found and petitioner in its brief admits, there is nothing left in this case for a court to pass upon.

The unbroken line of Federal and State Court decisions is that the common carrier is liable for assaults like this.

Steamboat Co. v. Brockett, 121 U. S. 637, 645.

> "A common carrier is bound as far as practicable to protect his passengers, while being conveyed, from violence committed by strangers and co-passengers, and undertakes absolutely to protect them against the conduct of its own servants engaged in carrying out the contract."
>
> *Stewart v. Brooklyn and Crosstown R. R. Co.,* 90 N. Y. 588.

> "If the carrier places lady passengers under the protection of libertines, who insult or assault them, * * * he should be responsible for the injury. This rule rests upon sound reasons and is abundantly supported by authority."
>
> *Kansas City, Southern Ry. Co. v. Willsie,* C. C. A. 224 Fed. 908.

We could cite hundreds on the same point if necessary.

The sole ground of petitioner's complaint herein is, it claims that the lower court made no findings, and intimates the Appellant Court did not examine the evidence. It is wrong in both claims.

Women sometimes have to travel alone, and Congress and the courts have done all that they can to protect them. Going on board of a vessel is like going

into a new world, and if seasick and weak from lack of food, they are not normal beings. Congress has made rape on the high seas a capital offense, and it has also passed the following statute. Sec. 280 of the Criminal Code reads:

> "Every master, officer, seaman, or other person employed on board of an American vessel who during the voyage, under promise of marriage or by threats, or the exercise of authority, or solicitation, seduces and has illicit connection with any female passenger, shall be punished by imprisonment not more than twelve months, or a fine not more than one thousand dollars; but subsequent intermarriage of the parties may be pleaded in bar of conviction."

This second steward was married and had four children. (R. 219.)

If it was seduction an action for damages against the shipowner would still lie, but it was rape pure and simple. And this was a civil action for damages for rape and not a criminal prosecution.

Respondent caused the arrest of the second steward. The U. S. Commissioner testified:

> "Then there is a note here, U. S. Attorney suggested that the complainant make complaint to the state court on account of her condition."

There is no explanation of why she should have been sent to the State Court. The Federal Courts had jurisdiction.

The U. S. Commissioner also testified (R. 204):

> "I listened to her story and it impressed me as being truthful to the extent that she had been seduced."

The Commissioner simply mistook the law.

In the trial court herein 13 witnesses testified, 7 for respondent and 6 for petitioner, and two depositions were introduced by respondent, and one that of the second steward by petitioner.

That this court may know the facts herein we give the following statement:

The evidence herein shows that Miss Vargas was a woman 24 years old (R. 12) at the time of the occurrence she complains of; that she is refined in her conduct and manner; well educated, both religiously and scholastically, the language of her testimony shows the latter, and not one word against her character can be found in the evidence. (R. 21-22.)

The evidence further shows (R. 24-25) that Miss Vargas was born in San Miguel, Republic of Salvador, and lived there all her life, she attended a non-boarding school from the time she was seven to twelve years old, and after that became an interne student at the college of Santa Techla about one hour's ride from the capital of Salvador until she was nineteen, when she went home and lived with her parents for about five years, making a little trip with her mother to the port of La Union, in 1912, about 15 years before she went on the "Ecuador." Her father is a jeweler in San Miguel, and in October, 1927, it was decided that she should come to San Francisco, for the purpose of learning the English language, taking advantage of the fact that she had a brother here. (R. 25.) Her father purchased her a ticket, gave her some money, which she deposited

with the purser when she went on board the "Ecuador" and nothing else, having it returned when she left the boat in San Francisco, and she went to the Port of La Libertad where the "Ecuador" was to arrive (R. 26-29), a brother in San Salvador, her cousin and her cousin's husband being there also, and her brother and cousin's husband went with her to the "Ecuador" in a gasoline launch, upon getting on board they went to the first person they met, Jose Blanco, who she describes as the second purser or steward. She had been assigned to stateroom 31, which was one room from the end of a corridor about 80 or 90 feet long (R. 278), her brother appears to have gone down to the stateroom with her, and they then went on deck to get her a deck chair, which her brother purchased for her, Blanco telling him where to get it. Her brother spoke to Blanco, who told him that he spoke Spanish, and that he would explain things in the dining-room to her. Her brother stayed about fifteen minutes on the vessel, and left for the shore. Blanco himself, by deposition, testifying (R. 219), speaking of her brother when on the vessel:

"Q. And he asked you to take good care of her?

A. He was recommending me to take good care of her because I was second steward.

Q. He asked you to take good care of her, didn't he?

A. Yes.

Q. And you said you would?

A. Yes, sir."

Miss Vargas became badly seasick the moment she got on board (R. 29), and so remained up to the time

the vessel arrived in San Francisco, all the witnesses agree on that. (R. 272.) She went on the vessel October 10th, about 4 P. M. and the vessel left La Libertad about from 8 to 10 o'clock on the evening of October 10th (R. 242), the steamer having at about 9:45, October 11th left San Jose her last port of call and started for San Pedro, California. Miss Vargas left the deck at about 9 and went to her room, she was alone in the room, was seasick all night, getting up twice to vomit in the wash basin (R. 31), but was unable to vomit anything but bile (R. 94), as she had eaten scarcely anything since she went on the vessel, thirty-seven hours before, and she woke about, as she thinks, five A. M., having no watch she was not sure about the time, about from 6 to 6:30, she unlocked the door for coffee. She also testified that she had a great deal of nausea. She testified (R. 31):

> "A. I left my bed for the purpose of opening up the door, as I could not go upstairs to get coffee, I thought it was better to have it brought there." (R. 32.)
>
> "Q. Did you try to dress at that time?
> A. Yes, but I could not, because I could not sustain myself, and I returned to bed."

Blanco entered her room at about 6:30 to 7 a. m. (R. 32, 35), and first asked her how she felt from the seasickness, she replied quite sick, he then pushed the door shut, and took hold of one of her hands, which she withdrew, and then commenced to use love phrases to her telling her that he had sympathized with her very much from the moment she came aboard the ship and had commenced to like her quite a bit.

She asked him to do her the favor to keep still, and he then got close to her and took her two hands, she struggled to loosen herself, and he then raised her two hands above the level of her shoulders and put them against the pillows. (R. 32.) She kept struggling, telling him that if he did anything to her he would greatly repent it (R. 88), he kept kissing her and finally held one of her hands with one hand and with that arm held the other arm down, and with the other hand evidently unbuttoned his pants and in spite of all she could do had sexual intercourse with her, by that time her struggles had got her over to the side of the bed, with her legs from about six inches above her knees over the side of the bed, he forced her legs apart by inserting one of his legs between hers and got in the center. (R. 91.)

There is not a shred of evidence that anyone was near that room at the time other than Miss Vargas, and Blanco, it does appear that the twenty or more bell-boys, bath-boys and waiters of whom Blanco was in charge go on duty at 6 in the morning and the first thing they do is to scrub the floors of the dining-room, wash the paint work down, wipe the dust down and polish brass. (R. 270.) Room 31 was immediately below the dining-room deck. (R. 278.) After all the scrubbing and cleaning is done, the waiters get ready for breakfast, which is at eight o'clock, after that they clean up the rooms. (R. 277.)

There were but few passengers on the vessel. The vessel had only about half of her complement of passengers. (R. 279.) Respondent's Exhibit 2 (R. 48)

shows 55, and her complement was 109. (R. 276.) And the only passengers in the corridor that the stateroom Miss Vargas occupied that appear in the record, was a Chinaman and his family that joined the vessel at Gautemala, but changed on account of the heat. (R. 94, 95.)

She was interrogated at length as to why she did not cry out, and testified (R. 34):

"A. Because at that particular moment I did not have courage to cry out, and not knowing who would come to my aid, and my voice might not have been heard, on account of the noise that there is in the morning aboard ship, I did not think it possible to be heard."

(R. 87):

"A. Because it didn't occur to me, I did not know that that man entered with bad intentions. What I did was to withdraw my hand forcibly.

A. Because at that moment it did not occur to me to cry out; the only thing that occurred to me was to defend myself.

Well, I moved my body and did everything that was possible to loosen my hand."

(R. 33):

"A. In the first place I did not holler out, because it did not occur to me, because I was afflicted with what was happening."

(R. 34):

"A. Besides I was telling him to leave me alone, to loosen his grip.

A. I don't know. All I do know is that there was an opening that led to the barber-shop, which was some distance away from there, but at that time in the morning I didn't know whether it was open."

(R. 87):

"Because I did not think he came in with bad intentions because at the moment of entering, he asked me, 'Miss, how do you feel, how are you.'"

(R. 88):

"Q. Did you strike him in the face, or scratch him?

A. I did not have the chance, because my hands were held."

As to the unlocking of the door, she testified (R. 79):

"Q. If it was for coffee, why didn't you accept the coffee that Blanco, when he first came into the room, offered to give you?

A. Because he offered to give me coffee, and I knew that a messboy would bring it, and I did not want to accept any favors from him.

Q. Why didn't you want to accept any favors from him, if he was the second steward, and you never had a word with him, except going up the gang plank?

A. Up to that time I did not know he was second steward."

After Blanco had accomplished his purpose, she got up and cried.

(R. 71):

"A. I didn't say anything; I was so completely exhausted."

(R. 35):

"After the act, he saw me cry, and he told me not to worry, that he would marry me.

A. That if I wanted to, we would get married in San Pedro.

A. He says for me to say nothing to anyone, that he would be of service to me, that I would

not get any advantage through *it, because they would not pay any attention to me.*
I said nothing; I only cried."

The vessel arrived in San Francisco October 21st, and her sister-in-law met her on the steamer and took her to her home. Her brother missed her as he was attending to some trunks or papers or something for her. He went out home when Miss Vargas handed him a letter from their father that she had brought up, in which he stated that he was sending a ring to him by his sister; the brother asked for the ring and Miss Vargas told him a man on the ship had taken it away from her, the brother, his wife and Miss Vargas then went down to the ship to get the ring. There is nothing in the record showing they had any other purpose in going. The ring was on her finger at the time of the assault, but being loose fell off to the floor in the struggle, and Blanco picked it up, "gathered it," as she testified (R. 37), and carried it away with him. Upon their arrival at the vessel Blanco took the ring off his finger and handed it to the brother. Blanco was not produced at the trial, his deposition was taken, when he testified (R. 224, 225) that he never had a ring, never saw a ring, and did not hand a ring over on the above occasion, although three witnesses produced in court testified that he did.

The brother, Ralph Vargas, testified (R. 111):

"A. Yes, he served liquor there and I said, 'I thank you, I want you to come out for dinner to my house,' because I didn't like to get anything without paying for it."

The brother, and his wife were in complete ignorance of the assault for some time after that, Miss Vargas testifying she did not have the valor to tell him as she was afraid it would shock him too much. (R. 39.) He testified that they had always been very strict in his family and she was afraid he would throw her out. (R. 116.) She further testified (R. 74) that she did not know she was in that condition until they took her to a doctor (R. 38):

> "A. No, I did not want to tell them, because I did not want to cause a terrible impression, because I had come especially recommended to them in San Francisco."

There were some exchanges of courtesies between the brother and his wife and Blanco, but all the testimony shows Miss Vargas had nothing to do with them. The brother testified (R. 106) about going out to a cafe:

> "A. We took my sister along because we could not leave her in the house by herself."

The testimony shows that she never spoke to Blanco at any of those times, and the visits between Blanco and the Vargas family seem to have been confined to two.

In March, Miss Vargas had to tell someone of her condition, and being afraid and ashamed to tell her brother, she went to a friend of the family (R. 39):

> "I told Amaral I didn't know what to do, that I am in such a condition, that I would like to leave this place and go somewhere else, because I am afraid to shock my brother too much."

Shortly before that Miss Vargas complained about not feeling well to her sister-in-law who took her to a doctor. (R. 144.) When Miss Vargas came out of the doctor's room crying (R. 144), that was the first time her sister-in-law knew anything about the matter; her husband did not know then. (R. 146.)

The hearing was had before Commissioner Krull, and it seems they had a great deal of trouble about getting an interpreter, they had three, none appears to have been able to interpret Spanish correctly. (R. 54, 92.) Commissione Krull (R. 205):

> "A. She could not speak English, and we had quite a little time geting someone to interpret, and we finally called upon Mr. Grant, a bailiff of the court, who talked Spanish, and he came in and did the interpreting."

The vessel went away; this case was commenced about a week after the foregoing. The vessel returned and a day or so afterwards Blanco called up Mrs. Julian, the mother of Mrs. Vargas, on the phone, went out to her house and talked to her quite a while about the whole matter, told her that he was very sorry, that he wanted to arrange everything amicably with her because there was no need for any lawyers nor any litigation; that he could pay the hospital expenses; that if the child was a girl to give it the mother's name, if a boy his name; that he was sorry for what occurred, because he was a married man, but if Miss Vargas would wait he would get a divorce and get married to her, but that he did not have any case or reason to get the divorce, etc. (R. 156, et. seq.)

Blanco was cross-examined twice and a foundation was laid for impeachment on all of the matters that evidence was introduced on, and he denied everything, contradicted the statement of Commissioner Krull, Mr. Grant, and everyone else that testified for the libelant, seven in all.

Mr. Shenick went on the stand and contradicted Commissioner Krull, Mr. Krull's records, Mr. Grant, Mr. Amaral and Mr. Ralph Vargas.

The Christmas card printed at the foot of page 30 petitioner's brief is not in evidence, and Miss Vargas did not testify that she received it from Blanco; all she testified was that it came to the house, her counsel wished to introduce it for further impeachment of Blánco, but concluding he could not prove the handwriting on it, after a visit to the Shipping Commissioner's office and examining Blanco's signature on the shipping articles, he dropped the matter; the record shows (R. 49):

> "Mr. HUTTON. * * * I will ask to have that marked for identification because I may want to examine Mr. Shenick on it."

III.

OUTCRIES AND FAILURE TO MAKE COMPLAINTS ARE NOT A PART OF THE OFFENSE OF EVEN CRIMINAL RAPE. THEY ONLY GO TO THE QUESTION OF CREDIBILITY.

Lord Coke said a charge of rape was easy to make and hard to disprove, but he never said that fact ought to and it never has defeated justice in a proper case.

Petitioner prints an excerpt from *Jensen v. Lawrence* on page 35 of its petition, but not all of the instruction as it was given, and the Supreme Court of Washington, did not hold that what petitioner has printed was the law, but held that the defendant who had excepted to it was not harmed.

The court held the following to be the law in that case (Syllabus) *Jensen v. Lawrence,* 94 Wash. 148:

> "The evidence in a civil action for an assault and rape is not insufficient to sustain a verdict from the fact that plaintiff made no outcry, where she testified that she resisted and was overcome by force and that there was intercourse without her consent. 'Rape, Civil Liability, Evidence, Sufficiency. In a civil action for rape, the failure of the plaintiff to make an outcry, or complaint within a reasonable time, may be explained, or excused, and it is merely a circumstance which the jury may consider tending to impeach the plaintiff, *and not a defense as a matter of law.*"

The law is the same in a criminal case, Lord Coke laid down the rule a great many years ago. Parliament then fixed the time in which the complaint should be made at 40 days, then abolished that and fixed no time, and the writer adds "for the reason that time does not run against the king." At the time of Lord Coke, England had less than five million people, everyone knew everyone else in the vicinity, and travel was infrequent, just what that rule can have to do with a female passenger going aboard a vessel alone in modern times knowing no one on board and not speaking the language of the vessel has not been pointed out.

Blackstone takes up the rule, 2 Cooley's Blackstone, 1374, and divides females into two classes, one of good fame, and the other of evil fame, and holds in effect that if the complaining party is of good fame that is sufficient, but even if she is of evil fame and has made neither complaint nor outcry.

> "these and the like circumstances carry a strong but not *conclusive presumption that her testimony is false or feigned.*"
>
> Petitioner's petition herein (page 14).

As the learned Circuit Court of Appeals said herein (R. 298):

> "and that the credibility of the complaining party is for the Court or jury, in view of all the surrounding circumstances."

It is impossible to make one rule of law that will fit into all human natures, as was well said in the following case:

People v. Kuches, 120 Cal. 566, 569:

> "One person would be paralyzed by fear—and rendered voiceless and helpless by circumstances which would only inspire another with higher courage and greater strength of will to resist an assault."

People v. Slaughter, 33 Cal. App. 365, 381.

A criminal rape case.

> "It is true that her testimony should be clear and convincing, but it is for the jury and the trial judge to determine whether it fullfils that requirement."

People v. Jones, 76 Cal. App. 144, 148.

> "It is well settled that one may be convicted of rape upon the uncorroborated testimony of the

prosecutrix, if the jury believes her story." (Cases cited.)

People v. Mazzurco, 49 Id., 275, 276;

Lindville v. Green, 125 Mo. App. 290.

"but we know of no case where the testimony of the prosecuting witness has been rejected solely on this ground * * * it must be remembered that plaintiff had no mother nor any other woman sufficiently close in her confidence and friendship in whom to confide."

Page 306:

"Finding as we do, that her conduct was not necessarily inconsistent with the natural impulses of feminine modesty and virtue."

Keamer v. Weigand, 91 Neb. 50.

"In her testimony she explained that she did not think to make an outcry, and that she was ashamed to tell what had taken place."

Smith v. Hendrix, 149 Iowa, 255,

says that the woman is

"always in an embarrassing position."

State v. Miller, 191 Mo. 612.

"They seem to indicate that an outcry is a necessary essential part of the proof of this offense, whereas the failure of outcry is simply a fact tending to discredit the good faith of the charge, a circumstance only of more or less weight, depending upon the surrounding circumstances. A failure to make it raises no presumption of law that the prosecutrix has sworn falsely; it is a circumstance to be weighed by the jury. (State v. Machis, 240 Mo. 650, i. e. 661, 662) and so also the delay in making the complaint."

State v. Peters, 8 Jones, N. Car. 19-22.

"But it is nowhere held that this female instinct is so strong and unerring as to have been made the foundation of a rule of law, as distinguished from a rule in respect to evidence and the weight to which it is entitled, which is a matter for the jury."

People v. Norrington, 55 Cal. App. 103, 108, 109.

"Though the absence of such outcries may have a tendency to refute the hypothesis of guilt, it is by no means conclusive. While, from the nature of the crime, it may be expected in such cases that the utmost reluctance would be manifested, and the utmost resistance made which the circumstances of the case will allow, still, to hold, as a matter of law, that such manifestations and resistance are essential to the existance of the crime, so that it could not be committed if they were wanting, would be going further than any well considered case in criminal law has hitherto gone. (State v. Pilegge, 61 Wash. 264.)"

Baccio v. The People, 41 N. Y. 265.

"that it is so natural as to be almost inevitable, that a female upon whom the crime has been committed will make immediate complaint thereof to her mother, or other confidential friend."

Miss Vargas had no mother, and no friend on board, and Blanco had told her that if she told anyone they would not pay any attention to her, she had a right to think on that that the whole crew were as bad as he was, as to the passengers, she testified (R. 81):

"A. I did not complain to any of them in the first place, because they did not speak Spanish, and, in the second place, because they might

consider me a woman of ill or bad repute or conduct."

(R. 72):

"I decided to suffer my disgrace alone, without telling anybody."

That was her right, and both answers are those of a woman of modesty, no modest woman ever wants to tell about such things, and even the courts only expect they shall be told to a mother or other confidential friend, not to strangers.

People v. Horn, 25 Cal. App. 583.

"(Syllabus) In a prosecution for rape it was proper for the court to reject an instruction offered, by the defendant, which, if given, would have impressed upon the jury the importance of the absence of proof that the prosecutrix made complaint of the assault immediately after it occurred, as such an instruction would tend to create the impression that a conviction of the crime of rape could not be legally justified where there was not proof of immediate discovery to some third party by the prosecutrix of the fact of the assault upon her person, *which is not required by the law.*"

588:

"The fact that the prosecutrix in a case of rape might have made complaint of the assault to a third person immediately after it took place may be shown for the purpose of corroboration only."

People v. Martinez, 59 Cal. App. 121.

"As we have stated, the fact of defendant's guilt did not depend upon corroboration of her testimony, and the fact that she a female under sixteen years of age, made no outcry but concealed from others the knowledge of the act was

not material to the inquiry, provided, the jury upon sufficient evidence was satisfied that he was guilty of the act as charged."

Garvik v. The Burlington Cedar Rapids Ry. etc., 131, Iowa, 415, 418.

"While the ordinary female who has been ravished will make the fact known to her family or friends at the very earliest possible moment, complaint is not always made and we have repeatedly held that conviction in criminal cases charging rape is proper though no complaint is made."

IV.

RESPONDENT WAS CORROBORATED BY THE LAWS OF NATURE.

According to the laws of nature, which do not lie, the child was conceived on the 12th day of October, 1927, the day she testified she was attacked.

Estate of McNamara, 181 Cal. 82, 89-90.

"While the average period of gestation is generally taken as 280 days."

Collier's New Encyclopaedia, Edition of 1928, Vol. 4, page 305:

"GESTATION. In physiology, the act of carrying young in the uteras from the time of conception to that of parturition, the average time of a woman's pregnancy is 9 solar months, or about 280 days, though it may be as few as 7 or as many as 10. * * *"

She commenced to have labor pains, which undoubtedly are a part of the birth of a child on July 18th, 280 days after October 12, 1927, and the only explana-

tion of the conception is that given by her and the admissions of Blanco himself which he subsequently denied making.

In

Wharton & Stille's Medical Jurisprudence, Vol. III, page 27,

we find

> "If her intercourse has been confined to one individual, there is no difficulty in drawing a correct conclusion from the premises. * * *
>
> As a basis for that rule the period of gestation is taken at 280 days."

On page 29 there is a computation of several hundred cases from different doctors, that give an average of 269.7 days. Then a minimum duration given by Auvard of 242 days, and a maximum given by Rossie of 317 days, as follows:

Auvard, minimum	242 days
Rossie, maximum	317 days
Total	559 days
Mean	279.5 days

The child was conceived, and born, its conception was according to the average, and there is nothing in the record anywhere that points to anyone as being its father but Blanco, and his paternity of the child has never been disputed.

V.

CRIMINAL RAPE IS A STATUTORY OFFENSE. CIVIL RAPE IS ALWAYS TREATED AS AN AGGRAVATED ASSAULT AND ONLY WANT OF CONSENT IS NECESSARY.

Jensen v. Lawrence, 94 Wash., supra;

6 *American Law Reports, Annotated,* 1011 (syllabus).

"Where an assault is accomplished by lascivious conduct by her assailant, and he improperly handles the wronged female, or indulges in undue or indecent familiarity with her person, it constitutes at least an indecent assault, and if the intention is to secure carnal knowledge of the female, it will constitute assault with intent to commit rape, and where actually accomplished by ravishment, it will constitute rape, *providing the woman does not consent to the acts complained of.*

This doctrine finds support in the following cases which involve an assault of one of the characters complained of."

The foot note contains a list of authorities from a great many states of the union.

Totten v. Totten, 172 Mich., 565, 575.

"The court in its charge clearly and correctly defined assault and battery and rape, then stated that in this civil case: 'The mere fact that she did not resist to the utmost would not excuse the defendant from his unlawful acts, *if you find he had intercourse with her against her consent.*'"

The charge was held correct; authorities cited.

In the case of

People v. Bonzani, 24 Cal. App. 549,

the court says on page 558, when discussing the crime of criminal rape:

"Men often become demons on such occasions or while attempting an outrage by force upon the opposite sex."

Of course, any one is entitled to damages for any kind of an assault, the aggravated character or results thereof simply increasing the amount of the recovery.

33 *Cyc.* 1521:

"But conduct of plaintiff short of consent is no justification, and if force was used to overcome the resistance of plaintiff and she finally consented to intercourse, although not in consequence of the violence, defendant is still liable in damages for the assault."

Palmer v. Baum, 123 Ill. App. 584.

In that case the parties had been drinking together; it seems they had been drinking together, and the court stated the law to be as follows on page 587:

"The penetration of the person of the woman without her consent, although no considerable force is shown to have been exercised, it amounted in law to an assault; such an assault being clearly unlawful, force may be implied. The mere fact that the woman may have permitted appellant to, and did herself, indulge in such lascivious conduct as to almost amount to an invitation to him to do as he did, did not in law authorize or license him to penetrate her person without her knowledge or consent."

American & English Encyclopedia of Law, Vol. 33, page 1428, on resistance is as follows:

"The true rule is that the amount of resistance necessary will depend on the circumstances, such as relative strength of the parties, the age and condition of the female, the uselessness of resistance, and the degree of force manifested."

People v. Dohring, 59 N. Y. 374, 383, cited by appellant, contains the following:

> "Of course, the phrase, 'the utmost resistance,' is a relative one; and the resistance may be more violent and prolonged by one woman than another, or in one set of attending physical circumstances than in another. In one case a woman may be surprised at the onset and her mouth stopped so that she cannot cry out, or her arms pinioned so that she cannot use them, or her body so pressed upon that she cannot struggle."

Miss Vargas testified that Blanco held both of her hands, and had the weight of his body on her and he was very heavy. He was continually kissing her. How could she cry out?

What more could Miss Vargas do than is shown by the following testimony:

(R. 33):

> "A. When he saw that I was struggling to loosen myself, he took the two hands, and raising them above the level of my shoulders, he did thus, and put them up against the pillow.
>
> A. Then, having me thus with my hands, he commenced to kiss me. Then he kissed me, and as I was struggling against him he would kiss me, and I was struggling against him. I was telling him if he did anything to me he would be afterwards sorry. He would not say anything when I was struggling; he would not use many words, but he would repeat he liked me, and he liked me. As I was only in my nightgown he finally overcome me."

(R. 34):

> "* * * because every time he would get up close to me in the struggle he would kiss me."

(R. 69):

"Q. How did you resist?
A. By trying to throw him off.
Q. Did you hit him?
A. I could not; he held both my hands."

(R. 70):

"A. I resisted with all the strength I had.
Q. Did you scratch him at all or hit him?
A. No, I couldn't do anything; he had both of my hands and was lying on top of me and I was helpless."

(R. 87):

"A. Well I moved my body and did everything that was possible to loosen my hands.
Q. He had one of your hands in each of his hands?
A. Yes."

(R. 88):

"A. He grabbed my hand, and when I was finally able to withdraw my hand, then afterwards he grabbed my hand here (pointing toward the sacrum) and I managed, then, in my struggle, I was able to get to the edge of the bed.
Q. Did you strike him in the face, or scratch him?
A. I did not have the chance, because my hands were held.
A. Yes, he did hold my two hands, but not with his two hands. It was one hand (pointing, with her arm) at first he took her left arm and then took her right arm, and thrust it toward her shoulder and held it against her body. As he was very heavy (taking the interpreter's left hand) he held it at an angle, in about such a position (off the interpreter's breast); with one hand thus he would hold me, and the part of the body he would hold with his arm.

A. He had both hands most all the time, except for one moment he withdrew a hand, but I don't know whether it was for the purpose of lowering his pants or not, but that was the only time when both of his hands did not hold my two hands."

(R. 90):

"A. Almost on the edge of the bed. My legs were up, and then taking her two hands, and holding them over her thus, beyond the edge of the bed. Then, again (illustrating) placing her hands about six inches above her knees, from this part upwards, that part of the body upwards, and this part over the edge of the bed."

(R. 91):

"A. One of his legs budged my legs apart and got in the center."

(R. 71):

"A. I didn't say anything; I was so completely exhausted."

What more could she have done?

State v. Cowing, 99 Minn. 123 (syllabus):

"In a prosecution for rape, resistance of the female is of necessity an issue only as it is invoked in the proof of her want of consent which is always required. To show unwillingness her resistance must be proportionate to the occasion under the circumstances and at the time of the act complained of, in many cases there must be resistance to her utmost, *or at least to the extent of her ability.*

In peculiar cases, a less degree may be sufficient. In exceptional cases, rape may be made out without any proof of resistance."

In *Garvik v. The Burlington Cedar Rapids Ry. etc.*, 131 Iowa 415, a porter on a Pullman car assaulted a girl in the toilet on the car, and the court said (p. 418):

> "While the ordinary female who has been ravished will make the fact known to her family or friends at the very earliest possible moment, complaint is not always made and we have repeatedly held that conviction in criminal cases charging rape is proper though no complaint is made."

VI.

THE EVIDENCE HEREIN WAS OF TWO CLASSES.

A great deal of the testimony was taken for the purpose of impeaching Blanco the second steward.

And a great deal was taken to show what took place in petitioner's office; the latter is binding on the petitioner, and it was admissible as a part of a transaction that petitioner brought out itself, in the introduction of the record presented by Commissioner Krull (R. 201, 206) having introduced evidence of a part of a transaction, respondent was entitled to the whole of it.

VII.

MISS VILLAVICENCIO WAS NOT IN THE STATEROOM.

If that young lady had been actually assigned to that stateroom, this assault could have been committed if she had been absent for a time. She went into the stateroom on the night after it happened, the peti-

tioner testifying that she had asked the steward to put someone in there, testifying that she was afraid to stay there alone. (R. 36.)

It was almost a year thereafter before she and the other witnesses testified on the subject, and had evidently, and naturally, forgotten all about the time, they may have remembered the incident, but as to the date no one could be expected to remember that. That is shown by the testimony. Mr. Henry, the steward, testified (R. 271):

> A. It was either the night we left La Libertad or the next morning, *I would say,* I am not sure as to that."

That simply means he made a guess at it, and was not sure even of his guess.

> (R. 275.) "A. Yes. We put her in there the night we left La Libertad or the next morning. *Now I am not sure,* but she was in the room the rest of the trip."

Witness Lorenzen (R. 178):

> "A. I believe, after I talked the matter over, that she was a passenger from Corinto, Nicaragua, to San Francisco, a steerage passenger."

That witness had to talk the matter over with someone before he could make up his mind that Miss Villavicencio was even on the vessel.

Miss Villavicencio herself testified she left Corinto on the "Ecuador" October 8th, the fact is the vessel left on the 9th, and that she slept in the steerage two nights, and then was moved into stateroom 31 at La Libertad and that it took the "Ecuador" two and a half days to go from Corinto to La Libertad.

The fact is it is only 174 miles and took 13 hours steaming time (R. 194), so if she slept two nights in the steerage, and left Corinto on the 9th of October, it was impossible for her to have gone into stateroom No. 31 at La Libertad on October 10th. (R. 170, 171.) She also testified, twice, that the vessel arrived in San Francisco in November (R. 167, 172), the fact is she arrived in October. Mr. Mallory was in San Francisco and did not know anything about it.

VII.

PETITIONER'S AUTHORITIES.

Among the authorities cited by petitioner are the following:

Mills v. U. S., 164 U. S. 644.

A criminal case. In that case this court declined to go into the facts, but reversed the case on the following instruction:

> "The fact that all the force that need be exercised, if there is no consent, is the force incident to the commission of the act. If there is nonconsent of the woman, the force, I say, incident to the commission of the crime is all the force that is required to make out this element of crime."

On its face that instruction did not state the law in a criminal case of rape.

The following language of that case quoted in petitioner's petition

> "* * * though she object verbally, if she make no outcry and no resistance" (R. 13).

can have no application to this case, as whatever resistance there may have been in that case seems to have been equivocal. In this case, respondent's condition before the attack is described (R. 90):

> A. "I got up from the bed for the purpose of washing my face, and when *I found that I could not stand up* I then opened the door for the purpose of having coffee brought up to me."

After the attack:

> "I didn't say anything; I was so completely exhausted." (R. 71.)

People v. Benson, 6 Cal. 221, 223.

Was distinguished in:

People v. Moore, 155 Cal. 237, 240, and

People v. Norrington, 15 Cal. App. 103, 109.

In *Lind v. Closs,* the plaintiff told many inconsistent stories, the defendant went on the stand and admitted the intercourse, but claimed it was with her consent. The second steward, Blanco, was not even in court, although he was still in petitioner's employ; the presumption must be that if present in court his presence, or testimony, would have been adverse to the petitioner.

We respectfully state to this court, that the following matter found on page 5 of the petition herein is a reflection on and an insult to the learned Circuit Court of Appeals for the Ninth Circuit:

> "The judgment is not sustained by the evidence introduced before the court, and in the opinion of petitioner the judgment would never have resulted *had the record been carefully examined with a view of making careful findings to be entered by a court considering the matter de novo.*"

The opinion of the learned Circuit Court of Appeals shows that it examined the record carefully as it always does, and as it is its duty.

The following appearing on page 7 of the petition herein is untrue:

> "After the attack she went to breakfast and said nothing to anybody."

The testimony is as follows:

> (R. 35.) "I got up and went upstairs, and I sat down, I did not feel well."
>
> (R. 76.) "Q. Did you not testify, referring to the 12th, 'I left it' (referring to the room) 'about seven o'clock, when the bell rang for breakfast?' A. Yes, I left at that hour to go to breakfast, but I did not go to the dining room, I remained on deck because I could not stand up."

We respectfully submit, that as the learned Circuit Court of Appeals found

> "the overwhelming weight of the testimony clearly establishes the fact"

of sexual intercourse, and that the uncontradicted testimony herein shows it to have been a criminal assault upon petitioner, that both of the lower courts did their whole duty herein, and that nothing exists in this case but a question of fact, uncontradicted fact at this time, and that petitioner has not brought itself within any of the reasons stated in Sub. (b) of rule 38 of this court, as grounds for the exercise of the discretion of this court in granting writs of certiorari, that the decree of the trial court and judgment of the Appellate Court are overwhelmingly sustained by the law and the evidence, and that no good purpose would be

furthered by a re-examination of the case in this court.

We therefore respectfully ask that a writ of certiorari be denied.

Dated, San Francisco,
October 5, 1929.

H. W. HUTTON,
Attorney for Respondent.